(3)

FILED
NOV 15 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 684

COPPERWELD STEEL COMPANY,
Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT IN SUPPORT OF JURISDICTION

ROBERT G. DAY,
Counsel for Appellant.

FRANK R. S. KAPLAN,
E. P. MCHUGH, JR.,
HOPPE, DAY & FORD,
Of Counsel.

INDEX

Subject Index

	Page
Statement in Support of Jurisdiction:	
Statutory Provisions Conferring Jurisdiction	1
Statute of the State the Validity of Which Is Involved Herein	1
Date of Judgment and Date of Application for Appeal	4
Nature of the Case and Rulings of the Court	4
Substantiality of Questions Involved	6
Cases Supporting Jurisdiction	7
Stage at Which Federal Questions Raised	9
Opinions of the Court	10
Right to Certiorari	10
Prayer	11
Appendix:	
Opinions of the Supreme Court of Ohio:	
Opinion Sustaining Motion Treated as General Demurrer to Petition (142 O.S. 439—Jan. 19, 1944)	12
On Final Judgment (143 O. S., 591—July 24, 1944)	18
Majority Opinion	19
Dissenting Opinion	23

Table of Cases Cited.

Booth Fisheries Co. v. *Industrial Com. of Wis.*, 271 U. S. 208	7,8
Chicago Junction Case, 264 U. S. 258	7
Clemmer & Johnson Co. v. *Industrial Com.*, 112 O. S. 421	8
Coal Co. v. *Industrial Com.*, 108 O. S. 185	7,8
Cotting v. *Kansas City Stockyards Co.*, 183 U. S. 79	9
Crowell v. *Benson*, 285 U. S. 22	8
DeWitt v. *State*, 108 O. S. 513	9
Ex parte Young, 209 U. S. 123	9

Page

Fassig v. *State ex rel.*, 95 O. S. 232 8
Fed. Radio Com. v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266 7
Hawkins v. *Bleakly*, 243 U. S. 210 7
Humphries v. *Steel Corp.*, 132 O. S. 263, 270 8
Interstate Commerce Com. v. *L. & N. R. R. Co.*, 227 U. S. 88 7
Northern Pac. Ry. Co. v. *Dept. of Public Works*, 268 U. S. 39 7
Ohio Valley Water Co. v. *Ben Avon*, 253 U. S. 287 7
Public Service Com. v. *Havemeyer*, 296 U. S. 506 7
Santa Fe Pac. R. R. v. *Lane*, 244 U. S. 492 9
Senn v. *Tile Layers Protective Union*, 301 U. S. 468 6
Slatmeyer v. *Industrial Com.*, 115 O. S. 654 7,8
Smith v. *Cahoon*, 283 U. S. 553 8
State ex rel. Butram v. *Ind. Com.*, 124 O. S. 589, 593 8
State ex rel. Randolph v. *Ind. Com.*, 128 O. S. 27, 30 8
State ex rel. Slaughter v. *Ind. Com.*, 132 O. S. 537 7,8
U. S. v. *Abilene & S. Ry. Co.*, 265 U. S. 274 8
Voeller v. *Warehouse Co.*, 136 O. S. 427 8
Wadley Southern Ry. Co. v. *Georgia*, 235 U. S. 651 9
Waite v. *Macy*, 246 U. S. 606 7

STATUTES CITED

General Code of Ohio, Section 871-38 5,10
United States Code, Title 28, Section 344a 1,11
Section 350 4
Section 861a 1,11
Workmen's Compensation Act of Ohio (General Code of Ohio, Sections 1465-37 to 1465-112, inclusive) .. 2

IN THE SUPREME COURT OF OHIO

No. 29,746

COPPERWELD STEEL COMPANY,
Plaintiff.

vs.

INDUSTRIAL COMMISSION OF OHIO,
Defendant

STATEMENT IN SUPPORT OF JURISDICTION

The appellant, Copperweld Steel Company, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

Statutory Provisions Conferring Jurisdiction

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant case is conferred by Title 28, §§ 344(a) and 861 a of the United States Code.

Statute of the State, the Validity of Which Is Involved Herein

The statute of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio, the highest Court of such State, as not being repugnant to the Constitution of the United States is the Work-

men's Compensation Act set forth in the General Code of Ohio ("G. C.") §§ 1465-37 to 1465-112, inclusive, providing among other things that the decisions of the Industrial Commission upon claims for workmen's compensation on account of injuries or death of employees shall be final, except that claimants may appeal from denial of such claims on any of the grounds specified therein (G. C. § 1465-90; 120 O. L., S. 159, § 1); and further providing:

(a) For the creation of a state liability board of awards (G. C. § 1465-37), superseded by the Industrial Commission of Ohio (G. C. § 871-12; 103 O. L. 97, § 12);

(b) For the classification by the Industrial Commission of occupations or industries with respect to hazards, the determination of risks and fixing of rates of premium for the different classes, based on payroll or such other basis as the Commission may determine, to provide and maintain a state insurance fund adequate for workmen's compensation provided in the act (G. C. § 1465-53);

(c) For the fixing of rates of premium, to provide a solvent state insurance fund and surplus and granting the Industrial Commission power to apply that form of rating system in its judgment best calculated to merit or individually rate the risk more equitably, predicated upon the basis of individual industrial accident experience (G. C. § 1465-54);

(d) For the compulsory payment semi-annually by employers subject to the Act of premiums for workmen's compensation determined by the classifications, rules and rates made and published by the Commission, except as to those employers who qualify and elect to pay compensation direct and are only required to pay such portion of the premiums otherwise payable as are required to be credited to the surplus (G. C. §1465-69);

(e) That employers complying with the act shall not be liable for damages at common law or by statute for

injuries or deaths of employes occurring during the period covered by the premiums paid or qualification for self-insurance (G. C. §1465-70);

(f) For payment from the state insurance fund or by self-insuring employers direct to employes injured in the course of, and arising out of, their employment and to their dependents in case death has ensued (G. C. §1465-68, §1465-72);

(g) That any employe whose employer has failed to comply with the act who has been injured in the course of employment, or his dependents in case of death, may file application for and be awarded compensation; that any employe of a self-insuring employer may, in event of failure of his employer to pay compensation, file application with like effect; and for collection of any award in either case by civil action instituted by the attorney general of the state (G. C. §1465-74). The Supreme Court of Ohio has construed this section of the statute as permitting non-complying and self-insuring employers to contest the validity of any such award on any legal ground (including the ground that the injury or death did not arise in the course or out of the employment) by way of defense in the action for collection of such awards;

(h) That if any employer who has complied with the Act shall default in any required payment to the state insurance fund for a period of ten days after notice that payment is due, the Commission shall certify its finding to the Attorney General who shall forthwith institute a civil action against the employer and unless the employer within ten days execute bond to the state in double the amount claimed, the Court shall appoint a receiver of the employer's business (G. C. §1465-75); the corporation, its president, secretary, general manager or managing agent will be personally subject to fine and imprisonment (G. C. §1465-69 a) and the corporation, in case of injury to an employe or ensuing death is not entitled to the benefits of the Act but may be sued, and in such case, barred of the common law

defenses of the fellow-servant rule, assumption of risk, and contributory negligence (G. C. §1465-73).

Date of Judgment and Date of Application for Appeal

The date of the final judgment of the Supreme Court of Ohio, which is now sought to be reviewed, was July 19, 1944; the Petition for Appeal was presented herewith, within three months thereafter, as required by Title 28, §350 U. S. C.

Nature of the Case and Rulings of the Court

The case originated on petition filed by appellant in the Supreme Court of Ohio for relief against six certain orders of the Industrial Commission awarding workmen's compensation by reason of injuries and deaths of employes of appellant, alleging, inter al., that such injuries and deaths did not arise in the course or out of their employment; that the findings and orders of the Commission are unreasonable and unlawful in that they are not supported by any evidence but are contrary to the uncontroverted evidence before the Commission, are contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority, and are beyond the jurisdiction, of the Commission and would deprive the Plaintiff of its property without due process and deny it the equal protection of the laws.

In the petition appellant prayed that the orders of the Industrial Commission be set aside, vacated and reversed; that the claims and each of them be disallowed; that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the appellant's workmen's compensation risk, and requiring the defendant to vacate

such orders and disallow such claims; and for all such further relief to which the appellant may be entitled.

A motion to the petition was treated as a general demurrer (142 O. S. 439, 440) and sustained by the Court January 19, 1944. The Court in its opinion (142 O. S. 439) held (Syl. 1) that the provisions of G. C. § 871-38 that any employer or other person in interest, dissatisfied with any order of the Commission, may commence an action in the Supreme Court of Ohio against the Commission to set aside, vacate or amend any such order on the ground that it is unreasonable and unlawful and vesting the Supreme Court with exclusive jurisdiction, does not apply to orders awarding workmen's compensation under G. C. § 1465-90; that such orders are final, and that prohibition (Syl. 2), mandamus (Syl. 3), or other relief was not available to appellant.

An application for rehearing was filed and denied.

The opinion of the Court indicated questions as to the meaning and sufficiency of certain allegations; therefore an amendment to the petition was filed alleging in greater detail the absence of facts essential to compensability, abuse of discretion on the part of the commission, direct financial interest of the Plaintiff in the distribution of the state insurance fund, and the extent of such interest, and of the deprivation of its property without due process.

A general demurrer to the petition and amendment was sustained and final judgment entered for defendant July 19, 1944, thereby leaving in effect the illegal orders of the Commission, unsupported by evidence and entered in excess of its jurisdiction.

From the opinions the position of the majority of the court is clearly that under the Workmen's Compensation Act the action of the Commission allowing claims is final (142 O. S. 439, 441); that appellant is not entitled to remedy by review or other relief and that appellant was not thereby

deprived of property without due process or denied the equal protection of the laws (143 O. S. 591) although the premiums required to be paid by it for workmen's compensation will be increased and although non-complying employers and self-insuring employers are in position to obtain review of awards of compensation which are similarly illegal, unreasonable, void and beyond the jurisdiction of the Commission. That the Act so construed deprives appellant of property without due process of law and denies it the equal protection of the law is clearly demonstrated in the dissenting opinion (143 O. S. 596) of Judges Bell and Hart.

Substantiality of Questions Involved

This case involves the denial of due process and equal protection of the laws by refusal of review or other remedy to an employer contributing to the state insurance fund against unlawful awards of workmen's compensation in claims for injuries and deaths which were not occasioned in the course of or by the employment and therefore are not compensable, particularly in comparison with self-insuring and non-complying employers as well as claimants, all of whom are afforded a review or other means of testing the legality of the orders of the Commission.

The resulting unlawful increase in the premiums charged appellant over a period of five years will be substantial, having already developed to the extent of $20,018.62 in the year 1943.

The particular question presented—the denial of hearing on questions of law—is novel. On such questions the workmen's compensation acts generally afford some form of review. Substantiality of the questions involved is apparent when the precise question has not been passed on before.—*Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 476.

The Supreme Court of the United States has previously recognized the appealability of cases challenging the constitutionality of workmen's compensation laws according finality to decisions of the administrative tribunal on questions of fact; but the laws involved in those cases provided for review or appeal on legal grounds and they were held constitutional. *Hawkins* v. *Bleakly*, 243, U. S. 210; *Booth Fisheries Co.* v. *Industrial Com. of Wis.*, 271 U. S. 208.

The Supreme Court of Ohio has likewise previously recognized that denial of review other than on questions of fact would be unconstitutional.—*Coal Co.* v. *Industrial Com.*, 108 O. S. 185, 190; *Slatmeyer* v. *Industrial Com.*, 115 O. S. 654, 658; *State, ex rel., Slaughter* v. *Ind. Comm.*, 132 O. S. 537, 542.

Cases Supporting Jurisdiction

Administrative orders of a judicial or quasi-judicial nature are void if a judicial hearing is denied, if the hearing granted is manifestly unfair, if the finding is indisputably contrary to the evidence, if the facts found do not as a matter of law support the order made.—*Interstate Commerce Com.* v. *L. & N. R. R Co.*, 227 U. S. 88, 91; *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287; *The Chicago Junction Case*, 264 U. S. 258; 44 S. Ct. 317; *Northern Pac. Ry. Co.* v. *Dept of Public Works*, 268 U. S. 39. Appeal (or writ of error) was allowed in these cases.

An inquiry as to whether an order is reasonable and in conformity to law or whether it is supported by any evidence is judicial in character.—*Fed. Radio Com.* v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266, 277; *Public Service Com.* v. *Havemeyer*, 296 U. S. 506.

Administrative orders unsupported by evidence showing the facts required by the statute as basis for the order are beyond the power or jurisdiction of the Commission.—*Hawkins* v. *Bleakly, supra; Waite* v. *Macy*, 246 U. S. 606;

Fed. Radio Com. v. *Nelson Bros. B. & M. Co., supra; Slatmeyer* v. *Industrial Com., supra; U. S.* v. *Abilene & S. Ry. Co.*, 265 U. S. 274; *Crowell* v. *Benson*, 285 U. S. 22.

The question whether the injury or death arose in the course of employment is jurisdictional. *State, ex rel., Butram* v. *Ind. Com.*, 124 O. S. 589, 593; *State, ex rel., Randolph* v. *Ind. Com.*, 128 O. S. 27, 30; *Humphries* v. *Steel Corp.*, 132 O. S. 263, 270.

The right to judicial hearing or review upon questions essential to the jurisdiction of the Commission and the legality of an award, are recognized in *Fassig* v. *State, ex rel.*, 95 O. S. 232, 242; *Coal Co.* v. *Industrial Com.*, 108 O. S. 185, 190; *Clemmer & Johnson Co.* v. *Industrial Com.* 112 O. S. 421; *Slatmeyer* v. *Industrial Com.*, 115 O. S. 654, 656-658; *State, ex rel., Slaughter* v. *Industrial Com.*, 132 O. S. 537, 542; *Hawkins* v. *Bleakly, supra; Booth Fisheries Co.* v. *Industrial Com. of Wis.*, 271 U. S. 208. Appeal was allowed in the two cases last cited, involving Workmen's Compensation Acts.

Denial of due process will result from denial of judicial hearing or review. *Ohio Valley Water Co.* v. *Ben Avon, supra; Coal Co.* v. *Industrial Com., supra; Slatmeyer* v. *Industrial Com., supra.* This is true even though appellant have no legal interest in the state insurance fund and be not a necessary or proper party to the proceedings before the Industrial Commission since the operative effect of the act is to deprive it of property without due process. *Voeller* v. *Warehouse Co.*, 136 O. S. 427.

Likewise the equal protection of the laws is denied where others are afforded relief: *Coal Co.* v. *Industrial Com., supra; Smith* v. *Cahoon*, 283 U. S. 553; *Hawkins* v. *Bleakly, supra.*

To require that appellant default in payment of future premiums in order to test the validity of the awards included in computation thereof, foregoing the protection

of the act against suits at common law and subjecting itself and its officers to the other penalties of G. C. §§ 1465-69a, 1465-73, 1465-75 would deny due process. *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 661; *Santa Fe Pac. R. R.* v. *Lane*, 244 U. S. 492; *DeWitt* v. *State*, 108 O. S. 513, 533 (Opinion of five judges dissenting from prevailing opinion of two judges).

Stage at Which Federal Questions Raised

The Federal questions sought to be reviewed were first raised by the following allegations in the petition:

> "(e) The orders of the defendant are contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority, of the defendant and are beyond the jurisdiction of the defendant.
>
> "(f) The aforesaid orders of the Commission unless vacated, prohibited or enjoined will result in the merit, or individual, rating of the plaintiff's Workmen's Compensation risk to the prejudice of plaintiff, and in unlawfully charging and collecting from the plaintiff premiums therefor in excess of those which should and may legally be charged and collected.
>
> "(g) The aforesaid orders of the Commission, unless vacated, prohibited or enjoined, will deprive the plaintiff of its property without due process of law and will deny it the equal protection of the law."

In the amendment to the petition, it was alleged that:

> "Unless this Court review and vacate, prohibit or enjoin the orders of the defendant or require the defendant to vacate and set the same aside this plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws."

The Court clearly passed upon them as indicated by its opinions of January 19, 1944 and July 19, 1944. Both of

these decisions are based upon the finality accorded orders of the Commission by the Act (G. C. §1465-90) and upon the position that the contributing employer has no interest in the state insurance fund and is not a proper or necessary party to proceedings before the Commission. The opinion, in which two judges concurred, dissenting from the judgment of July 19, 1944 clearly demonstrates the effect of the Workmen's Compensation Act, the orders of the Industrial Commission, and the judgment in denying the appellant due process and the equal protection of the laws.

Opinions of the Court

Appended hereto are copies of the prevailing and dissenting opinions rendered by the Court in connection with the final judgment of July 19, 1944 and of the earlier opinion rendered in connection with the judgment of January 19, 1944.

Right to Certiorari

Independently of the right of appeal herein, the State of Ohio by the Workmen's Compensation Act, the orders of the Industrial Commission, and the decision and judgment of the court (including in addition to its construction of the Workmen's Compensation Act, its holding that G. C. §871-38 authorizing review is inapplicable and its denial of other remedy) have deprived appellant of property without due process of law and denied it the equal protection of the law—rights, privileges, and immunities guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution. Accordingly, if the appeal herein should be considered to have been improvidently taken, the Supreme Court of the United States should consider, and act upon, the papers as a petition for certiorari and as if presented to it at the time they were presented to the Supreme Court of Ohio, under U. S. C., Title 28, §344(c), and grant the relief prayed for.

Wherefore, the appellant, Copperweld Steel Company, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal under Title 28, §§344 (a) and 861-a of the United States Code; but that if the appeal should be considered as having been improvidently taken, the Court consider it as an application for certiorari and that appellant be granted the relief prayed for in its petition for appeal and assignment of errors.

ROBERT G. DAY,
Attorney for Appellant.

Frank R. S. Kaplan, E. P. McHugh, Jr., Hoppe, Day & Ford of Counsel.